APPELLANT PRO SE:

JOHN A. MURPHY
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN A. MURPHY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0610-CV-906
	)	
TAMI LOUISE MURPHY,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM 5
The Honorable Gary Miller, Judge
Cause No. 49D05-0409-DR-1813

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant-Respondent, John A. Murphy ("Husband"), appeals the trial court's decree in the action dissolving his marriage with Appellee-Petitioner, Tami Louise Murphy ("Wife"). Upon appeal, Husband presents four issues, which we restate as: (1) whether the trial court erred in resuming jurisdiction after having previously granted Husband's motion for change of judge; (2) whether the trial court erred in failing to enforce its own preliminary order requiring the parties to protect marital assets; (3) whether the trial court properly apportioned the marital debt; and (4) whether the trial court properly apportioned the marital assets.

We affirm.

The record reveals that the parties were married on March 6, 1994.[1] Husband and Wife had one child, K.M., born on December 7, 1995. On September 29, 2004, Wife filed a Verified Petition for Dissolution of Marriage, in which she averred that Husband had committed "domestic battery"[2] upon her and K.M. and was, at that time, in the Marion County Jail. The trial court eventually issued a preliminary order giving custody of K.M. to Wife, ordering Husband to pay child support, and giving Wife temporary possession of the marital residence but also requiring her to be responsible for the mortgage or rent thereon. The preliminary order also enjoined either party from "transferring, encumbering, concealing, or otherwise disposing of any asset of the parties

[1] Because the Statement of Facts in Husband's brief does not contain consistent citations to the appropriate portion of the record, some of our recitation of the facts comes from our decision in Husband's earlier appeal from the trial court's preliminary order. See Murphy v. Murphy, No. 49A02-0606-CV-461 (Ind. Ct. App. Jan. 22, 2007).

[2] The Indiana Department of Correction's website indicates that Husband was sentenced on May 4, 2005 for Stalking. See http://www.in.gov/serv/indcorrection_ofs?previous_page=1&detail=148040 (last visited July 18, 2007).

except in the usual course of business or for the necessities of life." App. at 34. Husband appealed the trial court's preliminary order, claiming that the trial court erred in imputing income to him despite his incarceration. Upon appeal, we affirmed the trial court's preliminary order. See Murphy, slip op. at 9.

Apparently, Wife was unable to make the housing payments on the marital residence, which the parties had acquired through a land contract. The owner of the home brought a foreclosure action against Husband and Wife. On November 30, 2005, the trial court entered a judgment in the foreclosure action against Husband and Wife in the amount of $4,492.31, plus costs and interest.[3] After proceedings supplemental were filed against Wife, she began to pay on this judgment through garnishment of her earnings. Husband, who was then still incarcerated, made no payment. On August 24, 2006, the trial court entered findings of fact and conclusions of law in a final decree dissolving the marriage between Husband and Wife. Husband filed a notice of appeal on September 22, 2006.

As an initial matter, we note that Wife has filed no appellee's brief. In such instances, we do not undertake the burden of developing arguments for the appellee, but instead, applying a less stringent standard of review, may reverse the trial court if the appellant establishes *prima facie* error. Thurman v. Thurman, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). We also note that husband has proceeded *pro se* before both the trial court and upon appeal. But this does not excuse Husband for failure to follow the

[3] This judgment was entered by Marion Superior Court, Civil Division 5, the same court which entered the decree being appealed in this matter.

applicable rules. See Lasater v. Lasater, 809 N.E.2d 380, 396 (Ind. Ct. App. 2004). This *pro se* representation has made resolution of the issues presented somewhat difficult. Indeed, we would likely be justified in considering several of the issues presented waived under Indiana Appellate Rule 46(a)(8)(A). However, we prefer to address issues upon their merits where possible, see Dedelow v. Pucalik, 801 N.E.2d 178, 183 (Ind. Ct. App. 2003), and we have endeavored to address Husband's claims as we understand them.

Husband first claims that the trial court erred when it resumed jurisdiction over the case after having previously granted Husband's motion for change of judge. Pursuant to Indiana Trial Rule 76(B):

> "In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one [1] change from the judge. After a final decree is entered in a dissolution of marriage case, a party may take only one change of judge in connection with petitions to modify that decree, regardless of the number of times new petitions are filed. . . ."

Husband filed a motion for change of judge on September 26, 2005. In an order on pending motions entered on October 19, 2005, the trial court wrote-in the following additional order with regard to Husband's motion for change of judge:

> "[Husband]'s request for change of venue [from judge] is granted. [Husband] to strike from panel 1st:
> 1) Honorable Thomas Carroll
> 2) Honorable S.K. Reid
> 3) Honorable David Dreyer" App. at 39.

As a general rule, once a proper and timely motion for change of judge is filed, the trial judge is divested of jurisdiction to take further action except to grant the change of

judge. Harper v. Boyce, 809 N.E.2d 344, 346 (Ind. Ct. App. 2004). Here, the trial court selected a three-judge panel from which each party could strike one name. See Ind. Trial Rule 79(F). In such cases, the moving party is entitled to strike first and has seven days from the day the clerk mails the panel to the parties in which to make his strike. T.R. 79(F)(2). If the moving party fails to strike within the required time limits, "the judge who submitted the panel shall resume jurisdiction of the case." T.R. 79(F)(4).

The record indicates no action with regard to the change of judge after the panel was named until November 1, 2005, when Wife filed a notice of no striking, informing the trial court that Husband had not yet stricken a name from the panel and that Wife could not name her strike until after Husband did so. Husband responded to this on November 9, 2005, in a filing in which he claimed that because he was acting *pro se*, he needed more time to research the various judges named on the panel. In this response, Husband also admitted that he received the trial court's order naming the three-judge panel on October 24, 2005. However, Husband did not file his strike with the trial court until November 18, 2005.[4] Thus, Husband clearly did not strike from the panel within seven days after the clerk mailed the panel to the parties as required by Trial Rule 79(F)(2). We therefore find no error in the trial court's resumption of jurisdiction pursuant to Trial Rule 79(F)(4).[5]

[4] The certificate of service attached to Husband's motion to strike indicates that he mailed his motion to strike on November 14, 2005. This was still well beyond the seven-day time limit set forth in Trial Rule 79(F)(2).

[5] Wife filed a "conditional" strike on November 28, 2005 in which she claimed that Husband's response was untimely and requested the trial court to resume jurisdiction of the case pursuant to Trial Rule 76(D). Trial Rule 76(D) deals with a change of venue from the county, not the judge. Regardless, the trial court's resumption of jurisdiction was proper under Trial Rule 79(F)(4).

Husband next claims that the trial court repeatedly failed to enforce its previous order to the parties that they protect their marital assets, thus allowing Wife to dissipate the marital assets and Husband's personal assets. Husband bases his claim upon the trial court's November 3, 2004 preliminary order which gave Wife temporary possession of the marital residence along with the responsibility of the "monthly mortgage or rent, insurance and taxes" on the marital residence. App. at 33. Further, the preliminary order enjoined both parties from "[t]ransferring, encumbering, concealing, or otherwise disposing of any asset of the parties except in the usual course of business or for the necessities of life." App. at 34. Husband claims that the trial court became aware that the marital residence was in jeopardy when a suit to foreclose on the home was filed in the same court on July 6, 2005.

With regard to the marital residence, the trial court found as follows:

> "the parties were purchasing by Land Contract premises commonly known as 941 East Raymond Street, Indianapolis, Indiana 46203. The Court FINDS that premises commonly known as 941 East Raymond Street, Indianapolis, Indiana 46203 hereinafter 'marital residence', was in the process of being purchased by [Husband] and [Wife] from one Terry T. Cooper for an original purchase price of Seventy-Four Thousand Five Hundred Forty-Five Dollars and Forty Cents ($74,545.40). The Court further FINDS that [Wife] was unable to continue payments on the marital residence and that the marital residence was the subject of a foreclosure action filed by Terry T. Cooper against [Husband] and [Wife] in Marion Superior Court under Cause No.: 49D05-0507-MF-025918. The Court FINDS that on November 30, 2005, this Court [in] said cause issued a judgment against [Husband] and [Wife] in the amount of Four Thousand Four Hundred Ninety-Two Dollars and Thirty-One Cents ($4,492.31) plus cost and judgment interest. The Court further FINDS that Proceedings Supplemental upon said judgment were filed against [Wife] on December 13, 2005 and that [Wife] has been paying through garnishment of her employment with CSX Transportation, Inc., the sum of One Thousand Two Hundred Twenty-Nine Dollars and Sixty-Four Cents ($1,229.64) per pay

> period. The Court FINDS that [Husband] has, as of the date hereof, made no payments on said judgment. The Court FINDS and ORDERS that [Husband] should and is hereby ordered to pay and reimburse to [Wife] through her attorney . . . the sum of Two Thousand Three Hundred Dollars ($2,300.00) within ninety (90) days and in the event that said Two Thousand Three Hundred Dollars ($2,300.00) is not paid by [Husband] as ordered by the Court then, said Two Thousand Three Hundred Dollars ($2,300.00) is hereby reduced to judgment against [Husband] in favor of [Wife]. The Court further FINDS that there is no equity from the marital residence to be divided by the parties and that [Wife] did nothing to prejudice the rights of [Husband] with respect to alleged equity in the marital residence." App. at 18-19.

The trial court also specifically found that Wife did not dissipate marital assets during the marriage.

The hallmarks of dissipation are waste and misuse. Bertholet v. Bertholet, 725 N.E.2d 487, 499 (Ind. Ct. App. 2000). The term "dissipation" carries its common meaning denoting "foolish" or "aimless" spending. Id. Dissipation has also been described as the frivolous, unjustified spending of marital assets that includes the concealment and misuse of marital property. Id. It generally involves the use or diminution of the marital estate for a purpose unrelated to the marriage and does not include the use of marital property to meet routine financial obligations. Id. Factors that a trial court may consider in determining whether assets have been dissipated include: (1) evidence of intent to hide, divert, or deplete the asset; (2) whether the expenditure was made for a purpose entirely unrelated to the marriage; (3) the remoteness in time to the filing of the dissolution petition; and (4) whether the expenditure was excessive or de minimis. Id.

From the trial court's findings, it is obvious that the trial court was well aware of the foreclosure on the marital residence but did not consider this to be a "dissipation" of marital assets. If Wife had purposefully not paid the mortgage in order to lessen the marital estate, then it might be said that she dissipated marital assets. However, the trial court's findings give no indication that this is what happened. Neither does Husband refer to anything in the record which would suggest that this is what happened. Simply because Wife was unable to stay current on the mortgage payments does not, in itself, establish that Wife dissipated marital assets. Husband has demonstrated no error in this regard.

In a related argument, Husband claims that the trial court erred in apportioning between him and Wife the debt owed as a result of the foreclosure on the marital residence. As set forth above, the trial court ordered Husband to pay to Wife $2,300 of the $4,492.31 judgment. Husband claims that because he was incarcerated, and because it was Wife's responsibility, per the preliminary order, to make payments on the marital residence, she should be solely responsible for the judgment resulting from the foreclosure action.

The division of marital property is a matter within the sound discretion of the trial court. Capehart v. Capehart, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999), trans. denied. The trial court is presumed to have followed the law and to have made all proper considerations in making its decision. Moore v. Moore, 695 N.E.2d 1004, 1009 (Ind. Ct. App. 1998). Upon review, we consider only the evidence most favorable to the trial court's disposition of the property. Id. We will reverse the trial court's decision only

where the decision is clearly against the logic and effect of the facts and circumstances before the court. Id. Marital property includes both assets and liabilities. Capehart, 705 N.E.2d at 536. The applicable statute requires the trial court to divide marital property in a just and reasonable manner. Id. (citing Ind. Code § 31-15-7-4 (Burns Code Ed. Repl. 2003)).

Here, Husband's argument is based in part on the preliminary order. But the preliminary order, by its very nature, is *not* final. The trial court was in no way bound by its prior determination in the preliminary order with regard to the marital residence. Moreover, that portion of the final decree regarding the marital residence appears to simply be an effort by the trial court to divide the remaining liability of the marital residence equally between the parties. After the foreclosure action, a judgment of approximately $4,500 was entered against both parties. As a result of the proceedings supplemental, Wife was required to pay this judgment by way of a substantial garnishment of her earnings. Therefore, by ordering Husband to pay Wife $2,300, the trial court appears to have required Husband to pay approximately half of the judgment entered against both parties but, thus far, paid only by Wife.[6] We cannot deem this an abuse of the trial court's discretion.

[6] In his brief, Husband claims that he settled with the contract holder from whom he and Wife had arranged to purchase the marital residence. According to Husband, this was the same plaintiff who filed the foreclosure action when Wife failed to make payments on the purchase contract. According to Husband, the very same trial court which heard the present case accepted this settlement agreement. Husband cites to a page in his appendix which contains a printout of a webpage which appears to have come from the Marion County Civil Court Clerk's Office and is entitled "Civil Case Summary Results." App. at 54. This summary indicates that in the foreclosure action, the trial court accepted a settlement between the plaintiff and Husband. However, Husband does not explain how this matter was brought before the trial court in the present case. In fact, the trial court's final dissolution decree specifically ruled

Further, even if Husband's incarceration were a reason to require Wife to be responsible for the entirety of the judgment, presumably Husband will not be incarcerated forever. Also, as we noted in our earlier decision upon appeal from the preliminary order, Husband has a post-secondary education. Murphy, slip op. at 8-9. When he is released from incarceration,[7] Husband should once again be able to pay his share of the marital liabilities.

Lastly, Husband claims that the trial court erred in the distribution of the marital assets. As noted, this decision is within the sound discretion of the trial court. Capehart, 705 N.E.2d at 536. Husband's argument on this point is unclear at best. But again, we endeavor to address his claims as we understand them. He notes the statutory presumption that an equal division of assets is just and reasonable. See Ind. Code § 31-15-7-5 (Burns Code Ed. Repl. 2003). He then alludes to his earlier claim that Wife has dissipated the marital assets, an argument we have rejected. He next attacks the trial court's finding that Wife did nothing to prejudice the rights of Husband with respect to his claim of equity in the marital residence. Thus, it appears that Husband is complaining

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that all of Husband's proffered exhibits were not admissible per Indiana Rule of Evidence 901(a) because none of the proffered exhibits contained proper authentication. Husband makes no argument that the trial court's rulings were improper, and, indeed, the one-page printout he now refers to does not appear to be authenticated in any way. We cannot fault the trial court for failing to consider improperly submitted evidence, nor may we now consider it upon appeal.

Furthermore, there is no showing that Husband requested that this trial court take judicial notice of the acceptance of the settlement agreement in the foreclosure action. Nevertheless, although the two suits were determined by the same court, it would appear that this trial court could not have appropriately taken notice of the settlement agreement in the different action. Brown v. Jones, 804 N.E.2d 1197, 1202 (Ind. Ct. App. 2004), trans. denied.

[7] The Indiana Department of Correction's website indicates that Husband's projected release date was March 11, 2007. See http://www.in.gov/serv/indcorrection_ofs?previous_page=1&detail=148040 (last visited July 18, 2007). Thus, Husband should already be out of prison.

that Wife unjustly dissipated any equity the parties had in the marital residence. We have addressed this argument above, concluding that Husband has not established that the trial court erred in determining otherwise. Beyond this, Husband makes no cognizable argument. See Ind. Appellate Rule 46(a)(8)(A).

This case could be viewed as a warning to those who represent themselves in what can be complicated legal matters. Here, Husband seems to have repeatedly hampered his own case by failure to understand the relevant procedural and substantive rules. In the end, however, Husband has failed to demonstrate to us even *prima facie* error with regard to the defects he claims to exist in the trial court's final dissolution decree.

The judgment of the trial court is affirmed.

ROBB, J., and VAIDIK, J., concur.